No. 88-1108

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

In re: ROYAL COMPOSING ROOM, INC.,

Debtor.

NEW YORK TYPOGRAPHICAL UNION NO. 6,

Petitioner,

—against—

ROYAL COMPOSING ROOM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Counterstatement of Questions Presented

1. Can the petitioner Union challenge for the first time on appeal one specific element of Royal Composing Room's post-petition proposal under 11 U.S.C. § 1113 after refusing to negotiate alternate modifications to the union contract and failing to offer evidence at trial regarding specific elements of Royal's proposal?

The United States Court of Appeals for the Second Circuit held that the Union could not "belatedly" attack one element of Royal's proposal on appeal.

2. Should Royal Composing Room be permitted to modify its union contract under 11 U.S.C. § 1113 where uncontradicted evidence in the record showed that to survive Royal needed all the modifications in its post-petition proposal including work rule changes?

The Court of Appeals, agreeing with the factual conclusions of two lower courts, agreed that it should.

Statement of the Parties to This Proceeding

Respondent Royal Composing Room, Inc. is a closely held corporation and has no subsidiaries or affiliates.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 848 F.2d 345 (2d Cir. 1988). This decision affirmed the decision of the District Court which is reported at 78 Bankr. 671 (S.D.N.Y. 1987), which had affirmed the decision of the Bankruptcy Court. 62 Bankr. 403 (Bankr. S.D.N.Y. 1986).

Statutes and Regulations Involved

11 U.S.C. § 1113 (Supp. II 1984) is reproduced in the Appendix following the brief.

I.

Statement of the Case

This case arises out of the bankruptcy and reorganization of Royal Composing Room, Inc. ("Royal"), a high-quality advertising-typography shop. Following a seven-day trial, the bankruptcy court overseeing Royal's reorganization ruled that Royal could reject its collective bargaining agreement (the "Contract") with the petitioner, New York Typographical Union No. 6 ("Local 6") under 11 U.S.C. § 1113. Based on the extensive and well-documented record before the Bankruptcy Court, the District Court and Court of Appeals affirmed the Bankruptcy Court's findings of fact summarized below.

Formed in 1975 by the merger of two unionized typesetting companies which dated from the 1920's, Royal competed in a labor and capital-intensive industry. Although Royal initially flourished, in the early 1980's radical new technology began changing the typography industry and with it Royal's fortunes. With the advent of computerized typesetting equipment, typography shops requiring less capital and fewer skilled workers prospered, and the number of non-union shops, charging lower prices, increased. *See* 62 Bankr. at 404, 412.

Faced with falling prices, increased competition and high union labor costs, Royal began to lose money rapidly. Even with extensive cost-cutting measures aimed at all parts of its business *except* union labor costs, Royal's gross revenues plummetted and it lost over $1 million between 1982 and 1986. 78 Bankr. at 672.[1]

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[1] Royal established at trial that beginning in 1983 it tried to salvage its deteriorating financial condition by effecting major cost savings. *Not one* of these savings was at the expense of Local 6 workers. Royal's efforts led the Bankruptcy Court to conclude that "[u]nion labor cost, Royal's single largest expense, is the only expense that has not been cut in the last four years." 62 Bankr. at 412 (footnote omitted). *See also id.* at 405 n.1 (outlining union wage costs).

Prices had been driven "down to the point where the market price [was] below the cost per unit of a union shop such as Royal." 62 Bankr. at 412. Based on the extensive expert testimony in the record, the Second Circuit agreed with the Bankruptcy Court that Royal had become "an economic anachronism." 848 F.2d at 346. Indeed, as the Union candidly concedes, Royal is now one of the last unionized advertising-typography shops in New York. Petition at 7.[2]

Faced with mounting losses, Royal filed its Chapter 11 petition in March 1986. In seeking modification of Local 6's Contract under §1113, Royal's post-petition, pre-application proposal (the "Proposal") consisted of terms that Royal had been discussing with Local 6 over the 10 months preceding Royal's bankruptcy, and which were now required for Royal's reorganization:[3] (1) Royal sought to substitute less expensive benefit plans for the contribution plans required under the Contract; (2) Royal sought the elimination of certain work rules relating to priority, job classification and training;[4] (3) Royal asked Local 6 to forego an April 1, 1986 3% wage increase; and (4) Royal asked Local 6 to withdraw arbitration demands through which Local 6 was seeking further benefits and pay hikes under the Contract. *See* 62 Bankr. at 408 nn. 8 & 9.

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[2] "Petition at ____" refers to Local 6's Petition for a Writ of Certiorari.

[3] Extensive evidence established that Royal began discussing these proposed modifications to the Local 6 Contract in May 1985. Further meetings on the modifications eventually contained in Royal's Proposal also were held on January 17, February 12 and March 3, 1986. 62 Bankr. at 408-09. Royal's Proposal was, therefore, neither new nor surprising to Local 6 and Royal consequently moved for rejection of the Contract immediately. There was then an approximately two-month pretrial bargaining period. *Compare* Petition at 9.

[4] *Priority* is a requirement that employees can *only* be laid off in order of seniority regardless of their comparative competency, merit or technical skills.

Classification rules divide employee job functions at Royal into five discrete and fixed categories. The Contract forbids Royal from using for any extended period of time an employee from one classification on a job covered by a different classification, even if the employee is capable of doing the job.

(*Footnote continued*)

Local 6 responded to Royal's bankruptcy and its §1113 Proposal with a stonewall. Throughout the pretrial bargaining period Local 6 would not change so much as a comma in the Contract. *See* 62 Bankr. at 408-09.[5] The trial judge found that

> *[t]he small number and short length of the meetings had is attributable to the Union.* The Debtor was continuously available for and sought other meetings. . . . At no time prior to May 5, did the Union make a counterproposal, comment item by item on the Debtor's proposal or the Debtor's financial situation, or state any reasons why it found the Debtor's request to be unfair or inequitable.

Id. at 409 (footnote omitted) (emphasis added).[6]

Training rules allow an employee who is laid off in one classification but has seniority (priority) over someone else in another job classification, to demand retraining for the other person's job. This thereby forces the layoff of a more junior employee with more experience and competence in this other job classification. Royal then has to pay both for the training costs and also for the time spent by other employees in overseeing the trainee employee in his new job. 62 Bankr. at 417. Royal's Proposal also sought relief from certain holiday and vacation rules. *Id.* at 416.

[5] Indeed, "[t]he Union made it clear that the workers would in all likelihood strike if rejection were permitted [even though a] strike alone could force [Royal] to close permanently." 62 Bankr. at 405. Such tactics were not unusual for the President of Local 6, Bertram Powers. It was Powers, President of Local 6 since 1961, who called the disastrous 114-day strike against New York's newspapers in late 1962 that resulted in the eventual closing of four New York dailies: the *Mirror*, the *Herald Tribune*, the *Journal-American* and the *World Journal Tribune*. BIOGRAPHICAL DICTIONARY OF AMERICAN LABOR 470-71 (G. Fink ed. 1984); CURRENT BIOGRAPHY YEARBOOK 1974 324-27 (C. Moritz ed.)

[6] Local 6 now labels its conduct as "engag[ing] in limited negotiations." Petition at 29 n.12. Local 6's counterproposal was made by Local 6's attorney orally during the final pretrial conference. Even the trial judge noted the inappropriateness and incongruity of the counterproposal, which "did not conform to the format of or respond directly to Royal's request . . . [and] provided significantly less economic relief" than Royal needed. *See* 62 Bankr. at 409-10 & n.13.

On May 8, 1986, a seven-day trial commenced. Royal's witnesses included economic and financial experts in the typography field.[7] Royal also submitted numerous financial and other exhibits documenting its need for relief from the Contract. Royal *specifically proved* that the priority, training and job classification work rules in its Proposal would cost Royal over $1.9 million between 1986 and 1989 and that these rules were also extremely wasteful of plant time and resources. Royal also showed that it would require all the projected savings in the Proposal *just* to survive and undertake reorganization.

Significantly, Local 6 did *not* contest the accuracy of Royal's evidence showing the savings to be expected from each part of the Proposal. Instead, both during the pretrial bargaining period and at trial, Local 6 chose to treat Royal's Proposal as "an aggregate" and "declined to respond to particular items" of Royal's Proposal. 62 Bankr. at 410.

Local 6 tried to counter Royal's evidence, and explain its failure to negotiate Royal's Proposal, by relying on a May 1985 accountant's report advising that Royal did not need any financial relief and, indeed, that Royal was operating at a profit. Discounting the accountant's report, the Bankruptcy Court noted that the report was simplistic and flawed, *intentionally ignoring* Royal's present and continuing operating losses. Local 6's projections of Royal's future performance were similarly rejected as a "mechanical manipulation" of historical cost ratios that did not account for the burgeoning labor-to-sales ratio at Royal. *See* 62 Bankr. at 409 n.13, 414-15.

After weighing the evidence, the Bankruptcy Court concluded that "Royal is plainly in need of financial rehabilitation." 62 Bankr. at 412. *See id.* at 411-14 (detailing Royal's losses). Moreover, in assessing the necessity for and fairness of Royal's

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[7] Royal's experts included a professor of economics from a major university and a financial expert who had worked in the typography field for many years and had "extensive familiarity with cost analysis under the [Local 6] contract . . . ." 62 Bankr. at 412, 418 n.28.

Proposal, the court held that "[c]omparison of the proposed savings with projected losses reflects that the savings are less than the losses." *Id.* at 414. Thus, Royal's Proposal *barely met* the savings needed just to attempt reorganization. All the modifications in the Proposal, including the proposed changes in priority, were therefore, by definition, necessary to Royal's reorganization. *See* 62 Bankr. at 417 ("Here there appears to be no meaningful distinction between reorganization and Royal's ultimate future. If Royal can reorganize by lowering its union labor costs, it has a future; if it cannot, it does not."). Finding that the trial record supported the findings of the Bankruptcy Court the Southern District of New York affirmed. *See* 78 Bankr. at 673-74.

On appeal to the Second Circuit, the Union for the first time "narrowed the focus of its attack on Royal's proposal" by trying to challenge only the "necessity for eliminating priority." 848 F.2d at 347. The Court of Appeals rejected this approach, however, holding that where the union has failed to focus on any specific aspect of the debtor's proposal before, it cannot then do so *on appeal*. Thus, having chosen to treat Royal's Proposal "as an aggregate" throughout the negotiating period and at trial (62 Bankr. at 410), Local 6 could not suddenly change tactics on appeal and "prevent rejection by *belatedly* attacking a specific element" of Royal's Proposal. 848 F.2d at 349 (emphasis added). The Court of Appeals also held that the record supported the lower court decisions holding that Royal needed all the modifications in its Proposal to attempt a "truly successful reorganization." *Id.* at 350.

II.

Reasons for Denying the Writ

A. The Court Of Appeals Correctly Held That Petitioner Could Not "Belatedly" Attack One Element Of Royal's Proposal On Appeal After Failing To Offer Evidence At Trial Regarding Specific Elements Of Royal's Proposal

Petitioner asks this Court to decide what it asserts is an important issue under the Bankruptcy Code — whether the elimination of seniority was a "necessary" modification of the

Contract — even though it failed to present any evidence on this distinct issue in the Bankruptcy Court and despite a clear finding by the Bankruptcy Court that

> Royal established [that] its need for relief on the order of magnitude requested was necessary to Royal's economic survival.

62 Bankr. at 418. The Second Circuit affirmed, finding that

> the bankruptcy court's conclusion that Royal had, in fact, shown the necessity for eliminating priority amply is supported by the record and therefore is not clearly erroneous.

848 F.2d at 348.

Both before and after bankruptcy, Royal sought to modify the Local 6 Contract in several respects. Among other things, Royal proposed eliminating certain work rules, including priority. Local 6 consistently refused to negotiate *any* changes to the Contract, including alternate modifications to those proposed by Royal.

At the trial before the Bankruptcy Court, Royal established that each of its proposed modifications would result in substantial savings and that the work rules to be eliminated — priority, training and job classification — cost Royal hundreds of thousands of dollars and extremely limited Royal's flexibility to efficiently organize its plant time and resources.[8] Combined, these work rules would cost Royal over $1.9 million between 1986 and 1989.[9]

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[8] Thus, contrary to Local 6's claim, Royal's ability to increase the flexibility of its unionized labor force would allow Royal to *greatly enhance* its "prospects of successfully reorganizing" (*see* Petition at 26) by allowing it "to mold and adapt in a changing business environment." 62 Bankr. at 417.

[9] Thus, there is *no* factual basis for the dissent's statement that the Second Circuit majority opinion "allows individual anti-union modifications that save management little to lurk in court-approved proposals." 848 F.2d at 355 (Feinberg, J., dissenting). At trial Royal made an extensive showing detailing the disastrous costs of priority and the cost savings of each element of its Proposal.

During the pretrial bargaining period, Local 6 refused to respond to Royal's Proposal on an item by item basis (62 Bankr. at 409), and at trial offered *no* evidence as to what it believed the various work rules cost Royal.[10] Thus, Local 6 has never presented evidence to support its claim that the "elimination [of priority] adds little to an employer's prospects of successfully reorganizing." Petition at 26.

Indeed, to the contrary, Royal established that union labor costs, including priority, were its "single largest expense." 62 Bankr. at 412, 414.[11] Royal then established its need for the proposed modifications to the Local 6 Contract by showing that without modifying the Contract its projected losses would be over five-million dollars between 1986 and 1989. *See* 62 Bankr. at 414. The projected cost savings from Royal's Proposal, including priority, totaled only about four-million dollars. *Id.* As the Bankruptcy Court concluded, "[c]omparison of the proposed savings with projected losses reflects that the savings are less than the losses." *Id.*

Thus, the factual record clearly established Royal's huge current and projected losses, and that the cost savings that would result from Royal's Proposal to modify the Local 6 Contract were a necessary element in Royal's plan for reorganization. Faced with Local 6's refusal to negotiate or propose meaningful alternatives to Royal's Proposal, its failures of proof at trial and the choice between Royal's economic failure and possible reorganization, the lower courts opted for the latter. *See* 62 Bankr. at 418.

On appeal, the Second Circuit held that Royal had made the required showings under § 1113 and refused to allow Local 6 to "belatedly" focus on only one aspect of Royal's Proposal. Given

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[10] Having offered no evidence, Local 6 labels Royal's evidence "conclusory." Petition at 10 n.6.

[11] Union labor cost was also the only expense that had not been cut before Royal's bankruptcy. 62 Bankr. at 412. *See id.* (listing Royal's cost saving measures).

Local 6's failure of proof at trial and its refusal "to negotiate in order to obtain a different combination of modifications," the court held that Local 6 could only argue the very position it had chosen to take throughout: that the "total quantum of savings" in Royal's Proposal was unnecessary to Royal's reorganization. 848 F.2d at 349. Once again, given the trial record and Local 6's failures of proof, the Court of Appeals held that Royal had shown that it needed to eliminate work rules like priority to lower costs and increase productivity so as to meaningfully pursue a "truly successful reorganization." *Id.* at 350.[12]

To the extent petitioner now challenges the factual record in this case for the fourth time, its petition should be denied. Both the District Court and the Court of Appeals reviewed the voluminous factual record compiled by the Bankruptcy Court and disturbed none of the bankruptcy court's findings. *See* 848 F.2d at 350-51; 78 Bankr. at 673-74. *See also Anderson* v. *City of Bessemer*, 470 U.S. 564, 573-75 (1985) (trial court fact-findings not disturbed on appeal where supported by substantial evidence in record). Local 6's petition, however, continues to attempt a re-analysis of the facts. As the Court has stated on many occasions:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

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[12] Thus, the Court of Appeals did not relieve Royal of its burden of proof by requiring Local 6 to prove that Royal's Proposal was "unnecessary." Petition at 30, 39. To the contrary, the court simply responded to Local 6's failure to rebut Royal's evidence, finding that there was substantial evidence in the record supporting the lower court rulings. Similarly, the Court of Appeals decision does not allow Royal to "totally and permanently eliminate priority." Petition at 10; *see, e.g., id.* at 22, 46. Under § 1113, Royal was only permitted to eliminate priority for the purposes of its Chapter 11 reorganization. Local 6 remains the authorized collective-bargaining representative and could still undertake negotiations with Royal concerning priority and other work rules. *See* 848 F.2d at 351.

Graver Tank & Mfg. Co. v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).[13] As shown above, the only failures of proof in this case were by petitioner Local 6, and the record below should be reviewed no further.

The Court of Appeals holding also does not conflict with the Third Circuit's holding in *Wheeling-Pittsburgh Steel Corp.* v. *United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986). Each holding properly focuses on whether the labor union has laid a foundation for challenging the necessity of a bankrupt company's § 1113 proposal through either negotiation or evidence at the rejection trial. While the District Court and the Court of Appeals, in affirming the Bankruptcy Court, rejected some of the language of *Wheeling*, based on their facts these two cases would have reached the same results in either circuit.

In *Wheeling*, the bankrupt debtor proposed "an unusually long five-year term [contract] at markedly reduced labor costs based on a pessimistic five-year projection." 791 F.2d at 1090. Unlike Local 6, the union in *Wheeling* actively participated in the negotiation process, demanding a "snap back" provision that would recapture certain union concessions if the debtor did better than expected. After the parties bargained to an impasse the bankruptcy court held a trial on Wheeling's rejection proposal.

At trial, again in marked contrast to Local 6, the union showed that both before and after Wheeling's bankruptcy it had responded to the company's needs to reduce costs by making

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[13] Even the dissenting judge below concluded that "[t]he evidence was sufficient to support a finding that a limited intrusion into priority was necessary . . . ." 848 F.2d at 356 (Feinberg, J., dissenting). He also noted that in his view the record was not clear as to the extent of the planned incursion into priority. He concluded therefore:

> Because this factual issue is at the heart of the appeal and because it is a basic principle of federal jurisprudence that courts pass on legal questions only in concrete factual situations, I would not use this case to announce a new interpretation of the necessary proposal requirement.

Id. at 358.

numerous concessions on wages and benefits. *Wheeling*, 791 F.2d at 1077. Significantly, the union also produced evidence at trial contrasting with the bankrupt company's projections of the economic future of the steel industry in general and of Wheeling in particular. *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969, 978 (Bankr. W.D. Pa. 1985). The union was thus able to show that the addition of its proposed snap back provision would still allow the bankrupt company to survive and reorganize. The debtor in turn "offered no credible explanation why its proposal did not contain a 'snap back' provision." *Wheeling*, 791 F.2d at 1090.

Vacating and remanding the case to the bankruptcy court for further fact finding, the Third Circuit focused on the evidentiary foundation laid by the union, holding that the lower court erred by failing to consider whether the debtor's proposal could work, *i.e.*, permit reorganization, with the addition of the snap back provision proposed by the union. Until the entire proposal was considered in light of this added provision it could not be said that the debtor's original proposal contained those modifications necessary to the debtor's reorganization as required by § 1113. *Id.*[14]

Thus, *Wheeling* does not hold that a union may attack on appeal an element of the debtor's proposal that it has not focused on or responded to, either during negotiations or at trial. To the contrary, consistent with the Second Circuit decision, *Wheeling* holds that a union like Local 6 may challenge the exclusion of a given provision from the debtor's proposal upon a showing

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[14] To the extent *Wheeling* suggested to the lower court that on remand the necessity of the debtor's proposal be judged by whether the proposed modifications were "directly related to the Company's financial condition and its reorganization" (791 F.2d at 1088) or were needed to "prevent[] the debtor's liquidation" (*id.* at 1089), the decision below is not to the contrary given the record in this case. Royal showed that the modifications in its Proposal did not even generate enough savings to cover its projected losses, and that reducing union labor costs was crucial to its economic survival. *See* 62 Bankr. at 412, 414, 418. Thus, the record here establishes that Royal's Proposal *was* directly related to its financial condition and its reorganization, and that the proposed modifications were needed to prevent Royal's liquidation.

that the union has laid a foundation for this challenge. The union lays this foundation by negotiating for alternate provisions and by presenting proof at trial that its alternatives will still allow the debtor's reorganization.[15]

The decision below also does not conflict with *Wheeling* because it involves a situation not considered in *Wheeling*: one in which the union refuses to negotiate or otherwise provide evidence or input on the debtor's proposal. The Second Circuit, recognizing this, explicitly limited its holding to situations in which the union has refused to participate in the § 1113 process:

> Put simply, *where a union refuses to negotiate in order to obtain a different combination of modifications*, it may not challenge the particular combination, or any vital element, contained in the debtor's proposal. So long as the total quantum of savings is necessary under the *Carey Transportation* standard, the union may not prevent rejection by belatedly attacking a specific element.

848 F.2d at 349 (emphasis added).

Thus, there is no true conflict between the Second and Third Circuits on the issue of when modification to a union contract is "necessary" under §1113. As Justice Harlan stated, "differences between the Courts of Appeals in two or more Circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the

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[15] When, however, a union like Local 6 refuses to negotiate or present credible evidence concerning the debtor's financial condition and § 1113 proposal, the Second Circuit indicated that this position presents "risks":

> The balance of the equities nearly always will tip in favor of the party that seeks to reach a compromise and to that end negotiates in good faith. 11 U.S.C. § 1113(c)(3).

848 F.2d at 349. Thus, the risk to the union of total non-participation in the § 1113 process is that the debtor will propose and prove its own plan for reorganization which the courts will permit it to pursue.

cases involved." Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108, 111-12 (1959). As no other Circuit Courts have considered this issue under § 1113, this is an appropriate case to allow for further development in the lower federal courts. *See McCray* v. *New York*, 461 U.S. 961 (1983) (Stevens, J.).

The Court of Appeals decision does not permit bankrupt employers "to propose offensive, unnecessary modifications." Petition at 44. Royal proved at trial that its Proposal offered savings that were less than the bankrupt company's projected losses. 62 Bankr. at 414. Given that the goal of Chapter 11 is the debtor's economic survival and reorganization, Royal's Proposal could not have been more narrowly tailored.[16] More importantly, if Local 6 felt Royal's Proposal sought too much it should have come forward with reasonable counterproposals or evidence at trial that Royal could have pursued reorganization without eliminating priority. Local 6 failed to do this and the lower courts applied § 1113 to the record as developed by the parties.[17]

B. There Is No Confusion Among The Lower Courts In Applying Section 1113

Contrary to petitioner's assertion, certiorari is not required in this case to clarify § 1113 for the benefit of the lower federal courts. Petition at 27-28. Decisions by the lower courts demonstrate that these courts understand and can apply § 1113.

The lower federal courts generally apply the same criteria in evaluating § 1113 post-petition proposals. Invariably, the courts

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[16] Indeed, Royal consciously structured its Proposal to avoid requiring any Local 6 employee to take a cut in wages.

[17] Similarly, in *Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82 (2d Cir. 1987), the union "neither participated meaningfully in post-petition negotiations nor offered any reason for rejecting the [debtor's] proposal other than its view that the proposed modifications were excessive." *Id.* at 92. As here, the union's counterproposal in *Carey* didn't cover Carey's losses and offered savings far below those required for reorganization. *Id.* at 86. Thus, as with Local 6, the union in *Carey* laid no foundation, through negotiation or trial evidence, for its attack on the debtor's proposal.

utilize some variation of a nine-point test, originally suggested in *In re American Provision Co.*, 44 Bankr. 907, 909 (Bankr. D. Minn. 1984), which tracks the substantive elements of § 1113.[18]

In a number of these decisions the debtor's bid to reject a union contract has been denied because the courts found that the debtor failed to make an adequate showing of compliance with § 1113 requirements. *See, e.g., In re K & B Mounting, Inc.*, 50 Bankr. 460 (Bankr. N.D. Ind. 1985) (rejection denied where debtor did not provide sufficient information to union and proposal did not require sacrifices from parties other than unionized employees); *In re American Provision Co.*, 44 Bankr. 907 (Bankr. D. Minn. 1984) (rejection denied where debtor made only perfunctory attempts to meet with union and savings under proposal only amounted to about two percent of debtor's monthly operating expenses); *In re Cook United, Inc.*, 50 Bankr. 561 (Bankr. N.D. Ohio 1985) (rejection denied where company showing positive cash-flow, where there were questions as to the accuracy of debtor's accounting, and where impact of proposal on unionized employees was disproportionate to impact on other parties); *In re William P. Brogna & Co.*, 64 Bankr. 390 (Bankr. E.D. Pa. 1986) (rejection denied where proposal contained numerous provisions that would not save the company money and sought to cut union wages while paying creditors back in full).

As the Court of Appeals specifically recognized, § 1113 is a pro-labor law, 848 F.2d at 351-52, and the decisions cited above show that the lower federal courts are not applying § 1113 in an anti-union fashion. Rather, these decisions show that bankrupt debtors must make their proofs as required by § 1113 and show, as Royal did here, that their financial problems are

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[18] *See, e.g., In re Sierra Steel*, 88 Bankr. 337 (Bankr. D. Col. 1988); *In re Sol-Sieff Produce Co.*, 82 Bankr. 787 (Bankr. W.D. Pa. 1988); *In re Texas Sheet Metals, Inc.*, 90 Bankr. 260 (Bankr. S.D. Tex. 1988); *In re Walway Co.*, 69 Bankr. 967 (Bankr. E.D. Mich. 1987); *In re Amherst Sparkle Mkt., Inc.*, 75 Bankr. 847 (Bankr. N.D. Ohio 1987); *In re William P. Brogna & Co.*, 64 Bankr. 390 (Bankr. E.D. Pa. 1986); *In re K & B Mounting, Inc.*, 50 Bankr. 460 (Bankr. N.D. Ind. 1985); *In re Kentucky Truck Sales, Inc.*, 52 Bankr. 797 (Bankr. W.D. Ky. 1985); *In re Cook United, Inc.*, 50 Bankr. 561 (Bankr. N.D. Ohio 1985); *In re Salt Creek Freightways*, 47 Bankr. 835 (Bankr. D. Wyo. 1985).

real and serious, that savings necessary to reorganization can be realized by modifying a labor contract, and that the bankrupt company has treated all parties fairly and has not forced a union to bear a disproportionate share of the reorganization burden. These decisions show that the lower federal courts do not yet require the intervention and guidance of the Court in applying § 1113.

C. The Court Of Appeals Decision Is Consistent With The Language And Legislative History Of Section 1113

In enacting § 1113, Congress recognized that bankrupt debtors must sometimes be permitted to reject collective-bargaining agreements as part of their reorganizations. *See* 130 CONG. REC. S8892 (daily ed. June 29, 1984) (Senator Hatch stating that "[o]ften drastic measures are necessary to save the hemorrhaging company, including rejection of the business labor contract"); 130 CONG. REC. S8900 (daily ed. June 29, 1984) (Senator Moynihan stating that "in certain circumstances, we must recognize that costs, including labor costs, must be lowered for financially troubled firms to survive").

Congress, however, placed a heavy burden on the debtor seeking to reject a collective-bargaining agreement to justify the individual components of its proposal. Thus, the debtor must establish that its proposal is necessary to reorganization. As Senator Packwood observed,

> the debtor will not be able to exploit the bankruptcy procedure to rid itself of unwanted features of the labor agreement *that have no relation to its financial condition and its reorganization* . . . .

130 CONG. REC. S8898 (daily ed. June 29, 1984)(emphasis added). Here, consistent with Congress' intent, Royal showed how priority and its other proposed modifications related to "its financial condition and its reorganization," and showed that in this case labor costs had to be lowered for this "financially troubled firm[] to survive." 130 CONG. REC. S8900 (daily ed. June 29, 1984) (statement by Senator Moynihan). *See supra* at 5-6, 7-8; 848 F.2d

at 350 (discussing the relationship between priority and Royal's financial condition).

Notwithstanding the burdens of proof on the debtor, § 1113 also requires the union "to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement." 11 U.S.C § 1113(b)(2) (Supp. II 1984). Congress made negotiation a part of § 1113 in response to the Court's decision in *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1983), holding that a debtor was not required to engage in collective bargaining before modifying or rejecting provisions of a union contract. *Id.* at 534.

Fearing that under *Bildisco* companies might misapply the bankruptcy law to avoid collective bargaining, every proposed version of § 1113 sought to ensure the union's right to negotiate and participate in the bankrupt company's decision-making process. *See* H.R. 5174, 98th Cong., 2d Sess., 130 CONG. REC. 1842 (daily ed. March 21, 1984) (Rodino proposal); 130 CONG. REC. S6081-82 (daily ed. May 21, 1984) (Thurmond amendment); 130 CONG. REC. S6181-82 (daily ed. May 22, 1984) (Packwood amendment). *See also* 130 CONG. REC. S8891-92, 8897-98 (daily ed. June 29, 1984) (statements by Senators Hatch and Packwood stressing the importance of good faith negotiations between the parties). As passed, § 1113 guaranteed unions a voice in the bankruptcy process that many believed was lost in *Bildisco* by mandating good faith negotiations and information sharing, and by giving the union the ability to offer evidence to the bankruptcy court to show that the bankrupt company's proposal does not meet the requirements of § 1113.[19]

Here, Local 6 refused to participate in the bargaining process contemplated by Congress. Instead, Local 6 staked its case on showing that Royal didn't need any Contract modifications

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[19] When the union does negotiate and present a viable counterproposal the balance of equities under § 1113 will often favor adoption of the union's proposal. As noted by the Bankruptcy Court: "If the Union's proposal and the Debtor's proposal were in fact equally acceptable, the balance of the equities, *see* Code § 1113(c)(3), would not be likely to tip in the Debtor's favor." 62 Bankr. at 407 n.5.

and that Royal had not treated all parties fairly and equitably.[20] Local 6 thus courted the result which occurred here, and the Court of Appeals decision is consistent with § 1113 and its legislative history.

[20] Notwithstanding the importance of a given issue to a labor union (Petition at 44-45), § 1113 contains no provision focusing the reviewing court on particular types of modifications in a debtor's proposal, speaking only in terms of the debtor's "proposal" as a whole. *See* 11 U.S.C. § 1113(c)(1). *See also NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488 (1960) (under § 8 of the National Labor Relations Act government may not substitute its judgment for collective bargaining of parties).

III.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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ADDENDUM

§ 1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—

> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
>
> (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

> (1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize

the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.